

DARMAC COAL CO.

IBLA 83-615; IBSMA 81-66

Decided June 30, 1983

Appeal by Darmac Coal Company from the May 1, 1981, decision of Administrative Law Judge Sheldon L. Shepherd, denying an application for temporary relief and upholding the validity of Notice of Violation No. 81-I-62-8 (Docket No. CH 1-107-R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation; when it makes that showing and the showing goes un rebutted, the violation must be sustained.

2. Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

It is error for an Administrative Law Judge to fail to admit evidence of laboratory tests of water quality samples when the permittee challenges that evidence only by asserting that it is hearsay because of a failure to establish the chain of custody of the samples. Such an objection goes to the weight to be given to the evidence, not to its admissibility.

3. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally -- Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands: Generally -- Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

An alleged violation of the effluent limitation for pH set forth in 30 CFR 715.17(a) is properly upheld on the basis of a Hach test showing an acidity reading of 4 or lower, in the absence of evidence that the Hach test was not properly administered.

4. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally -- Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands: Generally -- Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

Where there is no adverse physical impact from current mining on water quality resulting from previous mining there is no disturbance that requires compliance with 30 CFR 715.17(a).

APPEARANCES: Bruno A. Muscatello, Esq., Butler, Pennsylvania, for Darmac Coal Company; William P. Larkin, Esq., Office of the Field Solicitor, Charleston, West Virginia, Glenda Hudson, Esq., Attorney, and Marcus P. McGraw, Esq., Assistant Solicitor for Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE IRWIN

Darmac Coal Company (Darmac) has appealed from the May 1, 1981, decision of Administrative Law Judge Sheldon L. Shepherd, Docket No. CH 1-107-R, which held, in a combined application for review and for temporary relief proceeding, that the Office of Surface Mining Reclamation and Enforcement (OSM) properly issued Notice of Violation (NOV) No. 81-I-62-8 to Darmac, pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.

§§ 1201-1328 (Supp. IV 1980) (the Act), and its implementing regulations, 30 CFR Chapter VII (the regulations). The NOV cited Darmac for violating section 715.17(a) of the regulations by permitting discharges from areas disturbed by surface coal mining and reclamation operations which exceeded the maximum allowable numerical effluent limitations for pH and manganese.

#### Procedural Background

On March 16, 1981, OSM Inspector Jeffrey King conducted an inspection of Darmac's inactive No. 7 strip mine, located in Donegal and Clearfield townships, Butler County, Pennsylvania, and discovered a small discharge, or seep, of water coming from an underground source on the permit area. He tested the discharge with a Hach kit <sup>1/</sup> and found it to have a pH of 4 (Tr. 24-25). He also took two samples of the discharge to a laboratory for testing (Tr. 7, 15-17) and, based upon its report, issued NOV No. 81-I-62-8 to Darmac (Tr. 7), alleging a violation of the effluent limitations of section 715.17(a) of the regulations with respect to pH and manganese. The NOV required Darmac to perform any measure necessary to assure that discharges from the disturbed area would not exceed the effluent limitations. The abatement time established by the NOV was April 21, 1981 (OSM Exh. A). However, Darmac applied for review of the NOV and for temporary relief, and the abatement period was extended pending the outcome of a hearing, which was held in Butler, Pennsylvania, on April 28, 1981.

The Administrative Law Judge regarded the facts as similar to those in Cravat Coal Co., 2 IBSMA 249, 87 I.D. 416 (1980), which held the mining operator responsible for water quality of discharges from a pre-existing seep when it mined through the seep. He upheld the issuance of the NOV as to the pH quality of the water on the basis of OSM's Hach test and denied the application for temporary relief (Decision at 3-4). He had previously refused to admit the laboratory reports analyzing OSM's water samples because the OSM inspector failed to establish a clear chain of custody of the water samples (Decision at 3; Tr. 17-24). Darmac subsequently appealed to the Board, arguing that (1) it was error to find that OSM had established a prima facie case solely on the basis of a Hach kit result, and that (2) OSM had not sustained its burden of proof as to the existence of a violation because, unlike the situation in Cravat, *supra*, Darmac had proved that it had not affected the seep. Darmac further argues that it was incumbent upon OSM to prove that the water from the seep was affected by Darmac's operation.

#### Discussion

[1] Three issues may be disposed of at the outset. Darmac's contention that OSM had the burden of proving that the water from the seep on Darmac's permit area was affected by Darmac's operation in order to justify the issuance of an NOV based upon an operator's failure to meet effluent

---

<sup>1/</sup> A Hach kit test is a field indicator test for water quality (Tr. 24).

limitations cannot be accepted. OSM succeeds in making a prima facie case that a violation occurred by the submission of sufficient evidence to establish the essential facts of the violation. If OSM's evidence is not rebutted, that evidence is all that is required to sustain the violation. See 43 CFR 4.1171(b). As discussed below, in this case there is ample evidence of the fact of the violation.

[2] As to whether laboratory reports may be admitted into evidence where there is an apparent break in the chain of custody of the samples, an Administrative Law Judge has discretion to admit evidence that he believes is probative, regardless of a witness' failure to establish a proper chain of custody, unless the opposing party discredits it on some other basis. In administrative proceedings generally, an objection based on the hearsay rule goes to the weight to be given the evidence, not to its admissibility. See Roberts Brothers Coal Co., 2 IBSMA 284, 294-95, 87 I.D. 439, 445 (1980), and cases cited in note 3. Thus, we believe the Administrative Law Judge properly should have admitted OSM's laboratory reports, and we will consider them to be part of the record.

[3] Thirdly, we believe the Administrative Law Judge was correct in deciding that the evidence of a Hach test administered by an inspector experienced in its use was sufficient to sustain a finding that the pH value of the effluent discharged from the seep was not within acceptable limits where the actual reading was 4.0, the minimum acceptable number was 6.0, and the witness testified that he had never experienced a Hach kit error of more than one point (Tr. 46; see also Tr. 25, 44-47, 52; Decision at 3). The results of a Hach test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered. D and D Mining Co., 4 IBSMA 113, 89 I.D. 409 (1982). Darmac's arguments concerning the unreliability of the Hach test results in this case are unpersuasive, particularly in view of the fact that its own evidence confirms those results (Appellant's Exh. 5). Thus, the evidence provided by the Hach test in this case was sufficient to sustain the Administrative Law Judge's conclusion that a violation existed.

[4] Darmac suggests that "the basic issue is whether or not this Operator should be held responsible for a pre-existing seep caused by prior mining activities on this site" and asserts that there is "little dispute" that "appellant did not affect the surface area around the seep" (Brief for Appellant at 3). OSM poses the issue as "whether Darmac disturbed the area of the seep within the meaning of the regulation and, thus, assumed responsibility therefor," 2/ and concludes its argument with the statement that "by affecting the area of the seep, either through spoil placement or topsoil removal, the area became part of its surface coal mining operation and Darmac was, therefore, responsible for the quality of the water dis!

---

2/ 30 CFR 710.5 defines "disturbed area" as "those lands that have been affected by surface coal mining and reclamation operations."

charged from that area" (Brief of OSM at 2-4). 3/ Based on a careful review of the hearing transcript and exhibits, we conclude that, although neither argument was successfully vindicated, the notice of violation cannot be sustained.

It is not disputed that Darmac discovered the seep before it began mining operations and made an effort to avoid the area during them. 4/ Darmac acknowledged, however, that some topsoil was sloughed off onto the seep as it was being removed by bulldozer from around the seep. 5/ It also acknowledged that surface drainage from a relatively small area around the seep was not passed through a sedimentation pond before leaving the permit area. 6/ For its part OSM conceded that the dirt that had come down on the seep was not enough to have affected its water quality. 7/

Thus, since some dirt was deposited on the seep, the area was technically affected, i.e., disturbed. Normally all surface water from the area would have to comply with the requirements of being passed through a sedimentation pond and meeting the applicable effluent standards before leaving the permit area. Under the circumstances of this case, however, the area was not as a practical matter disturbed. It has been held in a context also involving previously mined areas that absent adverse physical impact from the current mining on the condition remaining from the previous mining -- in those cases, orphaned highwalls -- no disturbance occurs that requires bringing that condition into compliance with presently applicable standards. Cedar Coal Co., 1 IBSMA 145, 154-56, 87 I.D. 250, 255-56 (1979). See Miami Springs Properties, 2 IBSMA 399, 403-05, 87 I.D. 645, 647-48 (1980). Since there is no showing of adverse physical impact in this case, Darmac is not responsible for the violation of 30 CFR 715.17(a). 8/

---

3/ 30 CFR 715.17(a) provides:

"Water quality standards and effluent limitations. All surface drainage from the disturbed area \* \* \* shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. \* \* \* Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitations \* \* \*."

4/ Tr. 60-61, 79, 89, 105-07, 113.

5/ Tr. 87, 89, 98-99, 102, 103-04, 109.

6/ Tr. 99-101, 113-14, 117-19.

7/ Tr. 42.

8/ In view of this disposition of the case, it is not necessary to discuss the possibility suggested in Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623-24 (1982), that compliance with 30 CFR 715.17(a) might be excused in similar circumstances where adequate data concerning hydrologic balance before and after mining is presented.

Therefore, pursuant to the authority delegated the Board of Land Appeals by the Secretary of the Interior, 9/ the decision of the Administrative Law Judge is reversed.

Will A. Irwin  
Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

---

9/ Secretarial Order No. 3092 of Apr. 26, 1983, 48 FR 22370 (May 18, 1983), transferred to the Board of Land Appeals "[a]ll of the functions and responsibilities delegated to the Board of Surface Mining and Reclamation Appeals with respect to appeals arising under the Surface Mining Control and Reclamation Act of 1977."